

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 103 of 2013

BETWEEN : **BHAN PRASAD** of Tavua, Fiji, Farmer but also of Sydney, Australia and sues in his capacity as the Administrator of the Estate of Ram Prasad late of Yaladro, Tavua, Cultivator and in his personal capacity.
PLAINTIFF

AND : **UDAY PRAKASH** of Tavua, Fiji, Cultivator.
DEFENDANT

R U L I N G

INTRODUCTION

- [1]. The plaintiff is the administrator of the estate of the late Ram Prasad. He is also a beneficiary of the said estate. His mother, the late Shiu Raji, (Mr. Ram Prasad's widow) was the original administrator of the said estate. However, she died without completing the administration. Accordingly, the plaintiff was to take out Letters of Administration De - Bonis Non¹. He institutes this action and the current proceedings in that capacity and as a beneficiary.
- [2]. On 30 December 2002, Shiu Raji entered into an agreement with the defendant for the sale and purchase of the estate property in State Lease No. 6582 comprising 18 acres 3r 27p (LD 4/4/832) together with the improvement thereon (house of iron and concrete and one bulk room), a tractor number BHO29², a trailer number AP797, and farm implements including a disc plough, a tiller, a grader and a double plough, harrow. The estate farm has a sugar cane registration number 3434 Yaladro sector. The total sale price was \$95,000.00 (Ninety Five Thousand Dollars).
- [3]. It is common ground that, pursuant to their agreement, the defendant did take over the farm and started cultivating the land. And he was to pay the plaintiff the purchase price over a period of 10 years from the cane crop proceeds. Meanwhile, as agreed between the parties, the title to the Crown Lease in question was to remain vested in the estate. The

¹ annexed to his affidavit and marked "A" is the Letters of Administration De-Bonis Non in the Estate of Ram Prasad.

² which the plaintiff says was his personal property but which he had allowed to be sold as an estate property.

agreement was that the title would only be transferred to the defendant upon settlement of the full purchase price.

[4]. It is also common ground between the parties that the defendant has not settled the full purchase price under the agreement. However, as to the reason for this, the parties are giving different accounts.

[5]. Because the defendant has clearly not paid the purchase price by the stipulated time, the plaintiff, by summons, seeks various Orders under Order 13 Rule 6(1), Order 19 Rule 7(1) Order 14 and Orders 85 and 86 of the High Court Rules, 1988. The plaintiff relies on his own affidavit in support of the summons. However, on 22 July 2013, the plaintiff's solicitors advised the court that he would now pursue prayers 1 and 2 only for the moment. The other prayers he will pursue later. Does that make this an interlocutory application for possession and/or an interlocutory mandatory injunction application? I ask those questions considering that prayers 1 and 2 seek the following Orders:

1. that the defendant Uday Prakash do give the plaintiff vacant possession to the plaintiff of the farmhouse and bulk room situated on State/Crown Lease No. 6582 on approximately half acre area. The said farmhouse is currently being occupied Prakash.
2. that the defendant be restrained by injunction from interfering with the plaintiff's possession and occupation and peaceful enjoyment of State/Crown Lease No. 6582 and the farmhouse and bulk and storage thereon.

SALE AND PURCHASE AGREEMENT

[6]. The defendant says that the agreement that he signed with the late Shiu Raji on 30 December 2002 is not the one that the plaintiff is exhibiting in his affidavit. After the signing of the agreement, no copy was given to him. Later, at some point, he went to the office of Chandra Singh and Associates to obtain a copy but was there told to collect it from the Department of Lands. The version of the agreement that Chandra Singh had deposited at the Department a copy of which the Department had given him, was not the same one that he had signed³.

³ the defendant deposes inter alia as follows:

The defendant says also that he was not told about the value of the farm prior to entering into the agreement⁴. This however, in my view is irrelevant in this case because of the limited application of the doctrine of *non-est factum*.

[7]. Whether the defendant did actually sign a different agreement with the late Ram Raji, and if so, whether that agreement is materially different from the one that the plaintiff is flaunting, the defendant does not care to explain. Nor does he care to explain whether that agreement contains provisions which would entitle him to remain in possession⁵. He asks the court to investigate the matter for him⁶. This court simply cannot entertain that request, let alone, accept his allegations on the point.

WAS AGREEMENT CONSENTED TO BY DIRECTOR OF LANDS?

[8]. As far as the plaintiff is aware, Chandra Singh & Associates, who drew up the agreement, had sought and obtained the consent of the Director of Lands as required under section 13 of the State Lands Act. The defendant however vehemently denies that the agreement he signed was ever consented to by the Director of Lands⁷. Both parties would

I admit, that the agreement was signed dated 30th December 2002 with the Plaintiff's predecessor Administratrix Estate of Ram Prasad namely Shiu Raji but to my surprise the Original Agreement that I have signed was never given to me to till I had to seek it from the Lands Department. As I went to collect my Agreement and consent letter from Chandra Singh & Associates I was advised that they can only give the consent letter but I have to collect the agreement from the Lands Department. This was advised by the Clerk Aklesh and I'm further surprised the copy of the Agreement I received from the Lands Department was not the same copy of the original and it is not my signature on the so-called agreement between Shiu Raji and myself. Also my signature and my thumb print and the initials do not match as per the agreement annexed with the request for injunction but the witness to both signatures is missing. The Plaintiff has not supplied a copy of true agreement.

He further deposes:

I deny that I breached the Agreement. The Plaintiff have never given me a copy of original Agreement, however, I had to obtained a copy of the so-called agreement (which is false) from the Lands Department (February 2013). The copy of the agreement is annexed here with Marked "A".

⁴ the defendant further says inter alia:

I in my best of knowledge object to any agreement signed, that has been annexed with the affidavit for injunction.

I was not aware of actual value for the farm and there was no valuation conducted prior to Sale of the Property.

I state that as per the original agreement the vendor and me, the vendor did not disclose the actual value for the property determined by a valuation expert.

⁵ the defendant deposes as follows:

The then Administratrix on farm No: 3434 brought me and my family from Masi Masi Tavua to the present place. The Plaintiff in this action used persuasive tactics and to sign an agreement.

Annexed hereto and marked Letter "A" is an agreement dated 30th December 2002. I admit that the signature in the copy is mine but the content of the agreement is very concise i.e. the original document with many other provisions that were agreed to is missing. The original agreement was registered under commissioner of Stamp Duties with the official seal whereas such official recognition is missing.

I in my best of knowledge object to any agreement signed, that has been annexed with the affidavit for injunction.

I was residing in Masi Masi Tavua but had to leave my home because of the Plaintiff and then Administratrix who have convince d me to leave my own home in return to their home where I'm staying now.

I to my best of knowledge and understanding object to Plaintiff allegation that the original Lease was ever given to me by Plaintiff's mother. I reiterate that I was not even given the original copy of agreement. Question of original lease became vague hence this matter could be better sorted out between Plaintiff and Lands Department and other stakeholders.

⁶ the defendant deposes as follows:

I have no solicitor to represent my case and I seek assistance of this Honourable High Court that primarily investigation be conducted in regards to the actual Agreement between the vendor and the Purchaser and also the signature and thumb print experts clarify in regards to matching of signature and the thumb prints of sample annexed herein. Annexure marked "B".

⁷ the defendant deposes as follows:

appear to agree then that the lease in question is a protected lease under section 13 of the State Lands Act which means that the prior consent of the Director of Lands is required before they entered into their arrangement and also before the plaintiff can obtain any order affecting the lease in question from this court.

LEASE STATUS

- [9]. According to the plaintiff, Crown Lease No. 6582 ran for a period of 20 years from 01 January 1995⁸. He had applied for an extension pursuant to which application the Director of Lands has agreed to grant a further 30-year extension upon expiry of the current term at the end of 2014. I note though that the handwritten minuted approval that the plaintiff relies on⁹ states inter-alia as follows: “*Approval granted for the transfer and renewal as requested herewith*”. The plaintiff says a new lease is being processed. The plaintiff does not say though whether the estate had in fact applied for an extension of the lease or whether he personally was applying for the issuance of a new lease to him personally (not as administrator or as beneficiary) upon the expiry of the estate lease. If a new lease is being processed in his name personally, which is what the minuted notes above seem to suggest, then it would be misleading to use that in this case in an action being brought for and on behalf of the estate.
- [10]. The defendant says he does not know when the lease will expire. He deposes in his affidavit though that the Department of Lands has verbally advised him to stay put on the land.

BREACH OF AGREEMENT BY THE DEFENDANT

Defendant’s Cultivation

- [11]. The parties agree that the defendant’s cultivation of the land was not up to par. They also agree that this was the main factor that led to his not being able to settle the purchase price by the date stipulated in their

No prior consent was sought for sale of the Estate Crown Lease No. 6582 by the Plaintiff. I object to the Statement by the Plaintiff that prior consent was obtained.

⁸annexed to his affidavit and marked with the letter “B” is a copy of the same.

⁹annexed to his affidavit and marked “C” is a copy of letter dated 25 May, 2012 by his Solicitors requesting a renewal and the Lands Department’s handwritten approval endorsed thereon.

agreement. The poor (or lack of) cultivation led to a consistent dwindling poor yield. This meant poor proceeds from the crops which meant that the defendant would struggle to have enough cash at hand to maintain a payment plan sufficient to meet the purchase price. The plaintiff says the farm had become “run down” as he puts it.

[12]. The defendant however seems to attribute the cause of his below-par cultivation to the plaintiff’s lack of bona fides in his dealing with him. He would say, for example, that the plaintiff had given him a farm tractor which had a lot of mechanical defects and which was useless for cultivation. Also, the defendant says, there was no capital backup to support the costs of repairs and maintenance¹⁰. The defendant deposes as follows:

The Plaintiff should be held responsible for the downfall of cane tonnages and also that the figures could have been better had the Plaintiff not always demanded for \$40,000.00 from me and also had the tractor BH 029 been in order the results could have been favourable. I should not be held responsible for the downfall of the tonnages and further state that the Plaintiff always demanded \$40,000.00 that it really annoyed me and also that I found it difficult to maintain farm tractor. I had lost my job and did not have enough money to repair the tractor.

I reiterate that the downfall in the production of the cane is purely due to defective farm tractor. Further to support the details of the costs for repairing the farm tractor BH 029 is annexed here with marked “C”.

[13]. But according to the plaintiff, despite the agreement stipulating that the defendant was only to use the tractor on the estate farm, the defendant has been using the tractor, trailer and other equipment in other farms to earn money and has pocketed the same for his own personal benefit.

[14]. The plaintiff says that the defendant actually destroyed part of the crop. This, the defendant denies¹¹. But according to the plaintiff, from past record, the farm, when properly cultivated, would yield over three hundred tonnes of sugar cane per annum. This did not happen when the defendant took over the farm. The reason, says the plaintiff, is

¹⁰ The defendant deposes as follows:

I deny the statement of the Plaintiff and I further state that due to the defects to the farm tractor BH 029 the farm cultivation was getting out of hand. There was no capital backup to support for repairs and maintenance of the tractor. That the then Administratrix, within the content of the actual agreement, ever mentioned that the farm tractor had belonged to the Plaintiff.

I deny that I breached the Agreement. The Plaintiff have never given me a copy of original Agreement, however, I had to obtained a copy of the so-called agreement (which is false) from the Lands Department (February 2013). The copy of the agreement is annexed here with Marked “A”.

¹¹ The defendant deposes:

I deny any destruction to crop and further state that the decline to cane production on the farm was gross negligence on the Plaintiff’s behalf for non-repairing of farm tractor and providing it with Licenses for road worthiness.

because the defendant had allowed bush and non-productive growth to spread on the land¹².

[15]. The plaintiff also alleges that the defendant took large amounts of fertilizer from the Fiji Sugar Corporation Limited at the estate's expense but did not use it on the estate farm. Instead, he utilized the same for his personal use. This, the defendant denies¹³.

[16]. According to the plaintiff, in 2002 when the land was properly cultivated it produced 334 tonnes of cane. In 2012, only 14 tonnes were produced¹⁴. The Lands Department became concerned about the lack of cultivation. On their insistence, the plaintiff gave notice to the defendant¹⁵. And when things still did not improve, he got Maharaj Chandra & Associates to give another notice¹⁶. The plaintiff says he has had to return to Fiji from his adopted country of Australia in order to take over cultivation of the farm as the estate crown lease was at risk of termination due to the lack of cultivation.

[17]. Counsel for the defendant mounts a case theory premised on the argument that the agreement was frustrated between the parties. How that helps the defendant escapes me – because the doctrine cannot be invoked where the alleged frustrating event has been due to the act or election of the party seeking to rely on it or even at the other party's fault. As Lord Radcliffe puts it in **Davis Contractors Ltd v Fareham U.D.C. [1956] A.C. 696.**

"Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.... that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

¹² According to the plaintiff,

The sugar cane harvest for 2007 to 2010 for the estate farm, according to the plaintiff, was as follows:-

- a. 2007- Nil tons
- b. 2008- 4 tons
- c. 2009 – 9 tons
- d. 2010- 10 tons

¹³ The defendant says:

I deny that I ever took large amount of fertilizers, whatever fertilizer was ordered was utilised on the farm and not for my personal use as stated by the Plaintiff.

¹⁴ a copy of the Fiji Sugar Corporation Ltd's figures verifying tonnage from 2002 to 2012 is annexed hereto and marked with the letter "E".

¹⁵ a copy of the same dated 8 December, 2008 is annexed to his affidavit and marked "F".

¹⁶ a copy of the same dated 26 April, 2013 is annexed to his affidavit and marked "G".

Defendant - Living in Farmhouse

[18]. The plaintiff says that the defendant, under the agreement, was allowed to occupy part of the farm house for convenience so he “*could easily farm the land and guard the crop*”. But, the defendant is still occupying the house despite having deserted cultivation. The plaintiff says that the defendant continues to trespass despite termination of the agreement. This is hindering the plaintiff’s (and his labourers) cultivation who have had to seek accommodation elsewhere. The defendant says however that he has been verbally advised by the Department of Lands to stay put on the land¹⁷. It is hard to believe the defendant on this in the absence of any supportive written material.

Estate – Subsidising Land Rental to Department of Lands

[19]. According to the plaintiff, because the defendant could not live up to his part of the bargain, the estate has had to pay rental to the Lands Department. The plaintiff says that the defendant’s production was so bad that after a while, it was not enough to even cover land rental and Fiji Sugar Corporation Limited dues (for fertilizer costs). The defendant refutes this allegation. He asserts that he paid most of the rentals himself¹⁸. I observe that the defendant seems to confirm thereby that the estate has been paying part of the rental.

Re-Bulldozing Land

[20]. The plaintiff says that he has spent \$7,000.00 in re-bulldozing the land, with other related costs to restore full productivity. The defendant questions this but does not deny it¹⁹.

¹⁷ He says:

I object to the claims by the Plaintiff that I trespass and also his claims for illegal Possession for the house. I have been verbally advised by the Department of Lands Office Suva and Lautoka to stay on the same land until it is finalised.

I object to the claims by the Plaintiff that I have taken possession of their personal possessions whereas the Plaintiff himself did not turn up according to the agreement and allowed me to stay and take possession of the farm and the house and whatever furniture and other item he claims is his, I totally deny and state that whatever furniture in the house belongs to me and that also the Plaintiff visited my family in April 2013 and took some pictures inside the house.

¹⁸ The defendant deposes as follows:

I deny that the land rentals were paid by the Estate of Ram Prasad whereas most rentals were paid by me (Cultivator). The farm production declined due the gross negligence of the Plaintiff and also non-provision of capital for farm tractor repairs and maintenance.

¹⁹ The defendant says:

That I object to pay sum of \$7,000.00 for re-bulldozing on the land because the farm only used to be maintained by the farm tractor. I object to Plaintiff’s claims for re-bulldozing cost.

Earnings from Hiring Out Tractor & Trailer

[21]. The plaintiff says that he used to be able to earn \$10,000.00 per year from hiring out the tractor and trailer. The defendant however says:

I object and doubt to the Plaintiff's claim that he ever earned \$10,000.00 from the tractor BH 029 because most at time the tractor remain defective and trailer was not in use and was found abundant (sic) in the neighbours area by me.

.....

I object to any misuse of tractor BH 029 which was never mentioned about the ownership as per the disputed agreement. Also the tractor remains out of order and did not have licence of road worthiness.

.....

By 21st April 2013 I had made much needed repairs to the tractor and it was ready to move. I strongly object to the Plaintiff's claim for any repairs to the Tractor BH 029 costing \$6,580.00 or \$6, 850.00 whatsoever, however, on 21st April 2013 that Plaintiff along with one Paras of Galitu, Lautoka drove away the tractor registration No. BH 029 fitted with tiller. The tractor was in perfect running condition or was ready for farm cultivation purpose. The Plaintiff's claim that the tractor was repaired with so many parts stated as in claims (a) – (n) is irrelevant and I further state that without part (crown pinion) the tractor would not have moved therefore I object to claims as in No. 32.

Original Lease

[22]. The plaintiff believes the defendant has in his possession the original lease which was given to him by the plaintiff's mother. The defendant however is refusing to give the same back to him which is preventing the plaintiff from getting the transmission to his name as trustee.

Damage to Farm Implements, Assets & Equipment

[23]. The plaintiff says he has spent \$6,000.00 personally on farm implements, assets and equipment which were damaged. He has also spent \$6,580.00 on tractor repairs²⁰. He had given his 4-wheel drive Nissan (reg. No. E 6140) for \$5,000.00 to the defendant at the latter's request but the defendant has neglected to pay it, let alone to repair or maintain the vehicle. As a result, the vehicle is now of no value. The defendant however says that:

I object that any farm implement assets and equipment were damaged. I object for any cost.

.....

I object the Plaintiff's claim that he ever gave the vehicle for farm use but in fact he sold it to me for \$5,000.00 annexed herewith marked "E" is a copy of the agreement of sale and also copy of the third party indicating that the Plaintiff never owned the vehicle whereas

²⁰ details are as follows:- fixing clutch plate, release bearing, pilot bearing, crown and pinion, primary fuel pump, new radiator, air cleaner assembly, new seat, new electrical wiring, new alternator, side box, starter serviced, new battery, 2 sets of back tyres so that the farm can be re cultivated to its previous production level. Total Spent: - \$6,850.00.

the vehicle belong to one Amka Prasad and also the vehicle was not fit for road due to the vehicle being declared defective by LTA on 29th May 2003. I was handed over the van in January 2003. After 5 months the vehicle was out of road by LTA. The van Reg. No. E 6140 did not belong to the Plaintiff. As when vehicle went out of road, I informed the Plaintiff but there was no response and so there was no point in repairing the vehicle and hence sending the payment as per agreement at first stage knowing that the vehicle is not owned by the Plaintiff, monies is paid for the vehicle would have been useless.

Losses to the Estate

[24]. The plaintiff says he has cultivated the farm land himself. The estate has lost profit and income from cultivation at the rate of \$10,000.00 per year for nine years amounting to \$90,000.00. This, the estate would have earned if the defendant had cultivated the land properly. The estate has neither received a purchase price from the defendant, nor has it profited from the same.

Undertaking As To Damages

[25]. The plaintiff gives an undertaking as to damages in the following terms:

I as the administrator of the Estate of Ram Prasad give my undertaking to abide by any Order this Court may make as to damages in case this Court should hereafter be of the opinion that the Defendants shall have sustained any by reason of this Order which the Plaintiff ought to pay, and to pay the same. Annexed hereto and marked with the letter "H" is copy of Valuation for Crown Lease No. 6582 valued at \$55,000.00. I also have a tractor which is worth \$16,000.00 approximately. The trailer is worth about \$2,500.00. Annexed hereto and marked with the letter "I" is approval to proceed with the legal action by Divisional Surveyor Western dated 3rd June 2013.

OBSERVATIONS & CONCLUSION

[26]. The land in question is a protected state lease. There was an agreement between the estate and the defendant over the sale and purchase of the land in question. Whether the agreement was consented to by the Director of Lands, the parties do not agree. Obviously, that was a dealing which should have been consented to by the Director of Lands under section 13 of the State Lands Act. But pursuant to their agreement, the defendant took over cultivation and occupation of the farm. He was to have paid off the purchase price of \$90,000 in 10 years from the cane proceeds. The plaintiff now seeks some injunctive orders from this court. Section 13 requires the consent of the Director of Lands before this Court can make any injunctive orders. Annexure I of the affidavit of the plaintiff is a letter dated 20 May 2013 by Mishra Prakash & Associates to the Director of Lands seeking consent to

proceed with this legal action and on which is endorsed a handwritten minute (without any official stamp) purportedly by the Director of Lands confirming her consent.

- [27]. The defendant himself is arguing that the sale and purchase agreement that he signed with the late Shiu Raji was not consented to by the Director of Lands. It follows therefore that she has absolutely no basis to assert any right whatsoever over the land based on the agreement which is null and void.
- [28]. And while I accept that an order for possession cannot be granted upon interlocutory application (**Pati v Kamal [1987] FJSC 16; [1987] 33 FLR 165 (27 March 1987)** citing **Manchester Corporation v Connolly & Ors**) and that a mandatory injunction is only granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future (**Pati v Kamal** (supra), I am also of the view that the fact that the defendant in this case has no basis at all to remain in possession, makes this a clear case for the granting of the injunctive orders (see **Chand v Prakash [2011] FJHC 640, HBC 169.210 (7 October 2011)** as per Callanchini J) subject to production of better and proper consent of the Director of Lands.
- [29]. I also accept that injunctions are a discretionary equitable remedy and are subject to the usual equitable bars so that if the applicant does not come to court with "clean hands", he will not succeed in his application. But this is not a case where the plaintiff has deliberately not obtained the Director of Lands consent to escape the contract.
- [30]. I will grant order in terms upon production of better and proper consent of the Director of Lands.

[31]. The case is adjourned to **14 November 2013** for mention to consider other grounds in the plaintiff's summons and to see whether consent has been granted properly. For the record, I am reluctant to grant Order in terms yet without evidence of proper consent as to do otherwise may be tantamount to abdicating finality to the Director of Lands.

.....
Anare TUILEVUKA
JUDGE
07 November 2013